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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 475

GEORGE JONES, JR., *Petitioner*,

v.

JESSE VICTOR HOPPER, President of Southern Colorado State College, and C. GALE SELLENS, WILLIAM H. SOUTHARD, ROBERT W. BARTLEY, L. RICHARD BRATTON, PHILLIP M. LORTON, STUART M. McLAUGHLIN, and MRS. WILLIAM B. NAUGLE, Members of the Board of Trustees of Southern Colorado State College, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

George Jones, Jr., the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on May 19, 1969.

Opinions Below

The opinion of the United States Court of Appeals for the Tenth Circuit is unreported and is printed in Appendix A hereto, infra, page 18. The judgment of the Court of Appeals is printed in Appendix A hereto, infra, page 35. The Journal Entry of Judgment is printed in Appendix A hereto, infra, page 36. The dissenting opinion of the Court of Appeals for the Tenth Circuit is unreported and is printed in Appendix A hereto, infra, page 30.

Jurisdiction

The judgment of the Court of Appeals was entered on May 19, 1969, (infra, Appendix A, page 36). The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

Question Presented

Whether a complaint alleging termination of a state university faculty member solely because of his exercise of first amendment rights in freedom of speech and association states a claim entitling him to relief under 42 U.S.C. § 1983 (the Civil Rights Act of 1871).

Statutes Involved

Amendment I of the Constitution of the United States: "*Freedom of religion, speech, and the press;* Right of assembly and petition.— Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the

freedom of speech or of the press or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Amendment XIV of the Constitution of the United States provides so far as is here relevant:

"*Guarantee of protection of all citizens.* — No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C.A., Section 1983:

"*Civil action for deprivation of rights.* — Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit inequity, or other proper proceeding for redress."

42 U.S.C.A., Section 1984:

"*Same; review of proceedings.* All cases arising under the provisions of this Act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are provided by law for the review of other cases in said court."

42 U.S.C.A., Section 1985 provides, so far as here relevant:

> "*Obstructing justice;* . . . if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws. . . .
>
> "*Depriving persons of rights or privileges* . . . In any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his personal property, or deprived of having and exercising any right or privilege of a citizen of the United States, a party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

42 U.S.C.A., 1986 provides, so far as is relevant:

> "*Same; action for neglect to prevent.* Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in Section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by

reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action...."

Statement Of The Case

Petitioner filed a Complaint, June 1, 1966, against the Respondents pursuant to the Federal Civil Rights Act.*

The Complaint averred that on February 25, 1966, the President and members of the Board of Trustees of Southern Colorado State College in Pueblo, Colorado, terminated Petitioner's services as an Associate Professor of Philosophy (3, 11).*

Petitioner had been appointed as Associate Professor on March 26, 1964, at an annual salary of $8,500.00 (4, 12) His contract was renewed after the first year, but not renewed after the second year:

"For the sole reason that he exercised his privilege as a United States citizen to speak and write his views on matters of public concern and interest, pursuant to the First and Fourteenth Amendments to the United States Constitution, and the Defendants conspired and agreed to deny the Plaintiff, and actually denied him the right and privilege to so speak and write. Although Plaintiff's termination was not a breach of contract, it was a termination of an expectancy of continued employment which is an

*42 U.S.C. § 1983, 1986 and 1988.

*References in this form are to the Transcript of the Record before the Court of Appeals, nine copies of which are lodged herewith.

injury to an interest which the law will protect against invasion by acts violating 42 U.S.C.A. § 1983, 1985, 1986, and 1988. The Defendants unlawfully terminated Plaintiff's employment because of the speaking and writing and holding religious views in the following instances:...'' (4)

The Complaint details four instances: (1) Petitioner having objected to the disqualification of an applicant for his department because the applicant was an oriental; (2) Petitioner's having attacked an English department textbook in the student newspaper as containing a ''pseudo-philosophy''; (3) Petitioner having founded an independent faculty-student publication which contained articles criticizing the war in Viet Nam, commenting on labor problems, pacifism, and containing an article by Petitioner objecting to monitored classrooms; (4) Petitioner having defended a student who had been committed by Court Order for hospitalization as a result of his attempt to register as a conscientious objector. (4-8) Petitioner averred he was a member of the Religious Society of Friends, and a Christian pacifist, and that his speaking and publishing views on pacifism was an exercise of his right to religious beliefs pursuant to the First Amendment of the Constitution of the United States. He averred that:

> ''Solely because of the aforementioned words, beliefs, statements and utterances, and similar words, beliefs, statements and utterances, of the Plaintiff, protected by the First Amendment of the Constitution of the United States, the Defendants terminated his contract as Associate Professor at said college, thereby carrying out reprisal against the Plaintiff for the exercise of his constitutional privileges, and violating his right to due process of law, freedom of speech and belief,

and of privileges and immunities of the United States citizenship." (8)

He averred that as a result of the termination of his employment, he suffered mental anguish, loss of income, diminution of his earning capacity, and was held up to great public scorn. (9)

In His Second Claim for Relief, he charged violation of 42 U.S.C.A. § 1985(2), in that the Defendants conspired to deprive him of equal protection of the laws and the exercise of his rights and privileges under the Constitution and laws of the United States. He demanded judgment against the Defendants for $150,000.00 actual, and $150,000.00 punitive damages. (9-10)

The Defendants filed a Motion to Dismiss (22), stating that:

> "Plaintiff has no federally protected constitutional rights to the renewal of his contract of employment. As a corallary thereto, Defendants have the right to refuse to renew an employment contract for any reason, where there were no rights of tenure as in the instant case.'

On November 28, 1966, the United States District Court for the District of Colorado, entered a judgment of dismissal. (59) In passing on the sufficiency of the complaint, the District Court accepted as true all facts pleaded, including the allegation that the sole reason for the failure of the Defendants to renew the Petitioners contract of employment were statements and actions of the Plaintiff protected by the First Amendment of the United States Constiution. (56) The Court held that:

"It was a matter wholly within the discretion of the Defendants whether Plaintiff's contract would be renewed or allowed to terminate. The fact that the Defendants' decision not to renew the contract was motivated by Plaintiff's statements as set forth in the Complaint is immaterial." (56)

On May 19, 1969, the Court of Appeals, en banc, affirmed the lower court, two judges dissenting. (A. 36*)

Reasons For Granting This Writ

I. *A Board of Trustees of a state college, no matter how broad its statutory authority and discretion, may not terminate a professor for constitutionally improper motives.*

The decision below held:

(1) "Government employment, in the absence of legislation, can be revoked at the will of the appointing officer." (A. 25)

(2) This principle is subject, "to the restriction that unreasonable conditions may not be imposed upon the granting of public employment." (A. 25)

(3) A professor, under Colorado law, "is not an officer, but an employee under contract to fill a chair of learning."[1] (A. 26)

(4) "An employer enjoys an absolute power of dis-

*References in this form are to pages in Appendix A.

[1]The dissent comments: "As a practical matter, this again hardly fits the relationship between Trustees or Regents of a college or university and the professors or the lesser teachers at such an institution. See **Shelton v. Tucker**, 364 U.S. 479"

missing his employees, with or without cause." (A. 26)

(5) Although Petitioner complained that Respondents failed to renew his contract, as a professor, solely because of his exercise of First Amendment rights, "one has no constitutional right to a 'remedy' against the lawful conduct of another." (A. 26)

The dissent correctly summarizes the majority's decision:

"The majority thus holds that under this Colorado statute, and apparently in the absence of a contractual provision or of tenure specifically provided by statute, the Board has unlimited power to discharge teachers." (A. 30)

Therefore, under the theory of the majority opinion, the institution could refuse to hire a teacher solely on the basis of race, religion,[2] or for any other constitutionally improper motive.

The majority sidesteps *Pickering v. Board of Education,* (1968) 391 U.S. 563, 568, and *Keyishian v. Board of Regents,* (1967), 385 U.S. 589, 605, which affirm that unreasonable conditions may not be imposed upon the granting of public employment, by reducing Petitioner to a mere employee, over whom his employer enjoys an absolute power of dismissal, with or without cause. This Court has long conferred a high order of constitutional priority to academic freedom. Justice Frankfurter, in his concurring opinion in *Wieman v. Updegraff* (1952), 344 U.S. 183, 195 noted that:

---

[2]Petitioner averred he was a member of the Religious Society of Friends, and that his speech and actions were an exercise of his right to religious beliefs. (8)

"In view of the nature of the teachers relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, in the case of teachers, brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakeable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes the caution and timidity in their associations by potential teachers."

And Chief Justice Warren, in *Sweezy v. New Hampshire* (1957) 354 U.S. 234, 250-51 said:

"The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straightjacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."

Justice Franfurter added:

"These pages need not be burdened with proof, based upon the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile

and so indispensable for fruitful academic labor." 354 U.S. 262 (concurring opinion)

To the extent that the majority below may be read to suggest that the Board had an unlimited discretion to discharge Plaintiff,[3] it means that teachers may constitutionally be compelled to relinquish First Amendment rights as a condition of employment. As was said in *Pickering v. Board of Education* (1967) 391 U.S. 563, 568:

> "To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this court. (citations omitted) '(T)he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.'"

This Court went on to hold that:

> "A teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." 391 U.S. 574

The decision below clearly conflicts with *Johnson v. Branch*, (4 Cir. 1966) 364 F. 2d 177 which holds valid a complaint under the Civil Rights Act that a school committee refused to renew the plaintiff's teaching contract to penalize her for exercising constitutional rights. The

[3] This is the way the dissent read the majority opinion. (A. 31)

lower court had upheld the validity of the complaint, in *Johnson v. Branch* (D.C. N.C. 1965) 242 F. Supp. 721, and at 731 said:

> "The complaint . . . insists that a conspiracy has been perpetrated by defendants in order to punish plaintiff for her acts whereby she exercised rights guaranteed her by the Federal Constitution and Acts of Congress. It is well recognized that the discretion of the defendants, in effectuating their hiring policies, does not extend to an arbitrary denial of those protected rights, while the denial is made under color of state law."

In *Alston v. School Board of City of Norfolk* (4 Cir., 1940) 112 F. 2d 992, cert. denied, 311 U.S. 693, the Court said:

> "It is no answer . . . to say that hiring of any teacher is a matter resting in the discretion of the school authorities. Plaintiffs, as teachers qualified and subject to employment by the state, are entitled to apply for the positions and to have the discretion of the authorities exercised lawfully and without unconstitutional discrimination. . ."

And in *Johnson v. Branch,* supra, at 364 F. 2d 180, the Court said:

> "However wide the discretion of School Boards, it cannot be exercised so as to arbitrarily deprive persons of their constitutional rights."

The Tenth Circuit is also squarely in conflict with *Bomar v. Keyes* (2 Cir. 1947) 162 F. 2d 136, although it attempted to distinguish that case. *Bomar* held a probationary teacher, who had not secured permanent tenure, could not be dismissed for exercising a constitutionally

protected privilege. The plurality below writes that *Bomar* referred to an interference "with the interest stemming from the contract existing between Bomar and the Board of Education." (A. 23) *Bomar* specifically said, however:

> "The wrong is independent of any breach of contract, and would be the same, if Keyes had induced the Board not to employ the Plaintiff; indeed, we assume that her discharge by the Board was not a breach of contract at all."

In *Rackley v. School District* (D.C. S.C. 1966) 258 F.Supp. 676, a complaint under the Civil Rights Act was upheld where the Plaintiff alleged her contract was not renewed because of her participation in civil rights demonstrations. There, the statute law of South Carolina conferred absolute discretion in the hiring and discharging of teachers. The Court said:

> "There is no right of tenure provided for public school teachers under the South Carolina law. Surely the Board of Trustees under our law are given discretionary power within the area of reason to discharge a teacher for cause when legally justifiable grounds exist, and to determine whether to continue such employment beyond the year in which a teacher has a contract." (258 F. Supp. 683)

The Court went on to say, at 258 F. Supp. 684, that teachers may not be deprived of personal liberties secured by the Constitution, and the discretion exercised by School Boards must be within reasonable limits so as not to curtail freedom of political expression or any other constitutionally protected right. The Court ultimately found the facts supported the Plaintiff's complaint.

Nor can the majority below be reconciled with the rule of the Seventh Circuit that even if teachers did not have tenure "the Civil Rights Actof 1871 gives them a remedy if their contracts were not renewed because of their exercise of constitutional rights." *McLaughlin v. Tilendis* (7 Cir. 1968) 398 F. 2d 287, 289.

Also in conflict with the majority is the holding of *Henry v. Coahoma County Board of Education* (5 Cir. 1965) 353 F. 2d 648 where it was agreed that a school board could not refuse to employ an applicant teacher because of her activities in the N.A.A.C.P.

Throughout the federal court system, the decision below is a glaring atavism. See, *Smith v. Board of Education* (8 Cir. 1966) 365 F. 2d 770; *Jensen v. Olson* (8 Cir. 1965) 353 F. 2d 825; *Brooks v. School District of Moberly* (8 Cir. 1959) 267 F. 2d 733; *Williams v. Sumter School District* (D.C. S.C. 1966) 255 F. Supp. 397; *Albaum v. Carey* (D.C. E.D. N.Y. 1968) 283 F. Supp. 3; *Carraway v. Jefferson Parish School Board* (D.C. La. 1966) 251 F. Supp, 462; *Hopkins v. Wasson* (D.C. Tenn. 1962) 227 F. Supp. 278; Van Alstyne, *The Demise of the Rights-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

Should any ambiguity in the opinion below seem a ruling that Petitioner's activities, listed in the Complaint (4-8), were not by their nature constitutionally protected, it is worthwhile to briefly consider the issue. The listed activities were well within the scope of protected criticism worked out by this Court from *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, to *Pickering v. Board of*

Education,[4] supra. See, also, *Meehan v. Macy* (D.C. Cir. 1968) 392 F. 2d 822[5]; *Murray v. Vaughn* (1969) 38 U.S. L. Week 2018[6]; *In re Tepedino* (N.Y. Ct. App. 1969) 37 U.S. L. Week 2707.[7]

II. *An expectancy of continued employment by a teacher is a sufficient interest to be protected by the Civil Rights Act.*

We have previously shown that even where a teacher seeks initial employment by a School Board, he may not be denied such employment for constitutionally improper motives. However, in the instant case, Petitioner did not allege he was a mere applicant for employment, but further alleged his contract of the previous year had not been renewed, and that he had an expectancy of continued employment. He cited *Bomar v. Keyes* (2 Cir. 1947) 162 F. 2d 136, which upheld a complaint under the Civil Rights Act by a probationary teacher who was dismissed for absences while serving on a federal jury. It was there held:

> "The wrong is independent of any breach of contract... Nevertheless, it may have been the termination of an expectancy of continued employment, and that is an injury to an interest which the law will protect against invasion by acts themselves unlawful, such as the denial of a federal privilege."

[4]A teacher's public criticism of the School Board, although partly based on false statements, was entitled to protection.

[5]A Canal Zone employee discharged for a defamatory lampoon of the Governor was entitled to a review of his discharge, in the light of **Pickering.**

[6]The First Amendment prohibits the government's discharge of a Peace Corps worker for publicly criticizing the government's Vietnam and Peace Corps policy.

[7]Criticisms by social investigators of the New York City Welfare Department's practices are protected.

The School Board had asserted in *Bomar*, that Plaintiff, "had not secured permanent tenure. Having been duly dismissed by the Board of Education during her probationary period, such dismissal is not subject to review."

The Second Circuit reasoned that since service on a federal jury is protected by the Civil Rights Act:

> "It would emasculate the Act either to deny protection against reprisal to those whom threats did not deter, or to leave without recourse those who were made victims of reprisals of which they had not been warned."

As the dissent below points out, the Plaintiff could very well prove an expectancy of continued employment to exist outside any specific contractual or statutory provision, and the majority could not very well base its opinion on the proposition that there was no "expectancy".

Conclusion

As the dissent renders clear, the decision below was aberrant from the teachings of the Court in *Pickering v. Board of Education* (1968) 391 U.S. 563, and from the prevailing views of other Courts of Appeal and District Courts. Petitioner prays that Certiorari be granted, and, if this Court considers it proper, that, without setting this case for argument before this Court, the Court summarily reverse the judgment of the Court of Appeals and remand to the United States District Court for the District of

Colorado, for the filing of responsive pleadings by the Respondents.

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Appendix A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH TERM — 1969

GEORGE JONES, JR., Appellant,

v.

JESSE VICTOR HOPPER, President of Southern Colorado State College, and C. GALE SELLENS, WILLIAM H. SOUTHARD, ROBERT W. BARTLEY, L. RICHARD BRATTON, PHILLIP M. LORTON, STUART W. McLAUGHLIN, and MRS. WILLIAM B. NAUGLE, Members of the Board of Trustees of Southern Colorado State College, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(District Court No. 66-C-290 Civil)

Eugene Deikman, Denver, Colorado, (Harry K. Nier, Jr., Denver, Colorado, with him on brief) for appellant.

Richard W. Laugesen, Jr., Special Assistant Attorney General, Denver, Colorado, (Duke W. Dunbar, Attorney General, Frank E. Hickey, Deputy Attorney General, James W. Creamer, Jr., Ass't Attorney General, Denver, Colorado, with him on brief) for appellees.

Before MURRAH, Chief Judge, LEWIS, BREITENSTEIN, HILL, SETH, HICKEY and HOLLOWAY, Circuit Judges.

PER CURIAM

This appeal is from a judgment dismissing with prejudice the complaint of appellant Jones, an associate professor of philosophy. The basis of the dismissal was that the complaint failed to state a claim upon which relief could be granted. Appellees, who are the President and members of the Board of Trustees of Southern Colorado State College, filed the motion to dismiss upon which the judgment is based.

The dismissal of the complaint, drawn as a civil rights pleading, presents the issue of whether a claim is stated under the Civil Rights Act.[1]

The complaint alleges jurisdictional facts,[2] identity of parties, their residence and citizenship, and the status of the college.

The complaint alleges the powers of the Board of Trustees are as follows:

> "The Board of Trustees is vested by [§§ 124-17-1 and 124-5-1 Colo. Rev. Stats. (1963)] with the entire control and management of the affairs of the College, has general supervision of said College and the control and direction of the funds and appropriations made thereto, with power to appoint and remove all sub-

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[1] 42 U.S.C. §§ 1983, 1985, 1986 and 1988.

[2] Jurisdiction of the court is invoked under 28 U.S.C. §§ 1331 and 1343, as well as under 42 U.S.C. §§ 1983, 1986 and 1988 of the Civil Rights Act.

ordinate officers, professors, associate professors, teachers, assistants, employees or agents, in, about, or concerning said College, to appoint or employ, discharge and suspend, contract and fail to renew contracts of employees and other subordinates, and to fix the salaries of each and prescribe their several duties. They further have the power and authority to prescribe the various books and texts to be used in the Colleges, the courses of study and instruction and to make all needful rules, regulations and By Laws for the good government and management of the same. The actions of President Hopper, hereinafter described, were approved, authorized and ratified by said Board of Trustees, and each of them."

It is further alleged the acts complained of are exercised under color of the statutes, regulations, customs and usages vesting the power above averred.

The complaint further alleges that Jones was given notice that his services would be terminated at the end of the academic year by a letter sent from the President and authorized by the Board which is attached to the complaint as Exhibit A.[3]

---

[3]Exhibit A: "February 25, 1966 Dr. George Jones, Jr., 1401 Greenwood Pueblo, Colorado 81003.
Dear Dr. Jones:

I regret to inform you that at the end of this academic year, your services with Southern Colorado State College will be terminated. "So that there will be no misunderstanding, I wish to point out that this decision was arrived at before the publicity surrounding the John Dean case. Prior to the John Dean case, the Chairman of the Division and the Dean College and I agreed upon this decision. The Chirman of the Executive Committee of the College from the Trustees of State Colleges in Colorado was likewise informed at that time.

"I trust and hope that you will find future employment which will be satisfying to you. Yours truly,

/s/ J. V. Hopper, President."

The complaint then continues with a partial description of the "John Dean case", referred to in the above exhibit.

The *curriculum vitae* of appellant Jones is set forth in the complaint as well as the details of his association and status with Southern Colorado State College. In this description of his status with the college, Jones points out that the duration of each appointment under which he served was one year and that it was at the end of his second appointment that the appellees determined he would not be reappointed.

The allegations then conclude that the reason Jones was not reappointed was because he had exercised his constitutionally protected rights[4] in the following manner:

(a) He objected to the disqualification of an applicant for his department because the applicant was an Oriental.

(b) He attacked an English department textbook in a student newspaper.

(c) He founded and independent faculty-student publication which contained articles criticizing the war in Viet Nam, commenting on labor problems and pacifism, and an article objecting to monitored classrooms.

(d) He supported the student, John Dean, referred to above in Exhibit A, who had been committed to a hospital pursuant to a court order obtained by his parents as a result of the student's attempt to register with his draft board as a conscientious objector.

---

[4]Under the First and Fourteenth Amendments to the United States Constitution.

Jones averred he was a pacifist by religious conviction and that his views expressed orally and by writing on this subject were an exercise of his religious freedom.

He concluded that because of the above conduct and actions an expectancy of continued employment was terminated which was an injury to an interest which the law will protect against invasion by acts in violation of the Civil Rights Act.[5]

Jones alleges he was damaged as a result of the failure to renew his teaching contract, and relief is prayed for in the amount of $300,000.00.

The second claim of Jones' complaint by reference adopts the foregoing allegations describing them as a conspiracy to punish him for exercising his constitutional rights granted by the First and Fourteenth Amendments. He further concludes he was denied equal protection under the law.

The basic requirements of a complaint based upon 42 U.S.C. § 1983 are: (1) that the conduct complained of was engaged in under color of state law, and (2) that such conduct subjected the plaintiff to a deprivation of rights, privileges, or immunities secured by the Federal Constitution and laws.[6] The allegations necessary to state such a claim, as in the case of any other civil action in the federal courts, are not to be held insufficient unless it appears beyond doubt that the plaintiff can prove no set

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[5]42 U.S.C. §§ 1983, 1985, 1986 and 1988.

[6]Flemming v. Adams, 377 F.2d 975 (10th Cir.) **cert. denied**, 389 U.S. 898 (1967); Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963).

of facts in support of his claim which would entitle him to relief.[7]

When we examine the complaint herein in the light of the foregoing rules, we are directed to ask: What guaranteed right, privilege or immunity was denied Jones which is protected under the Constitution and laws?

The complaint alleges the refusal of the appellees to reappoint Jones after the term of his current appointment expired.

Jones contends the appellees, authorized by the Colorado statutes to administer the college, have denied him a right of expectancy to continued employment because he exercised freely his constitutional rights of speech, publication and religion. Jones cites only Bomar v. Keyes as authority recognizing this expectancy interest.

Bomar, supra, related to a high school instructor who relied upon a probationary contract of employment which was terminated in October during the academic year. The court assumed that Bomar's discharge was not a breach of contract,[9] but identified her interest in the following language: "Nevertheless, it may have been the termination of an expectancy of continued employment, and that is an injury to an interest which the law will protect

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[7]Conley v. Gibson, 355 U.S. 41 (1957); Keenan v. Looney, 227 F.2d 878 (10th Cir. 1955).

[8]162 F.2d 136 (2d Cir.) **cert. denied**, 332 U.S. 825 (1947), **rehearing denied**, 332 U.S. 845 (1948).

[9]"By [the] word [privilege] we understand a freedom to assert a legal right or a legal power. . . . The [state] statute provides that 'the educational affairs of each city shall be under the general management and control of a board of education.' . . . we assume that her discharge by the Board was not a breach of contract at all." Bomar v. Keyes, 162 F.2d at 139.

against invasion by acts themselves unlawful, such as the denial of a federal privilege.'"[10] The federal privilege involved was jury service.

Analyzing this language, we direct ourselves to the question: What is the source of the interest? In seeking the answer we must take the facts into account.

The contract which established the interest attributed to Bomar was a probationary contract of employment between Bomar and the Board of Education. Keyes was not privy to the contract; therefore, the court could assume that Bomar's discharge was not a breach of contract. Keyes, however, by complaining to the Board, had interferred with the interest stemming from the contract existing between Bomar and the Board of Education. This analysis is sustained by the Restatement of Torts § 766 (1939)[11] which is cited as authority in *Bomar*.

The source of the interest in *Bomar* is the contract. The actions sounds in tort against one not privileged to interfere with the contract.

The complaint in our case makes no allegation or inference that a contract existed. Jones' complaint expressly concedes that his "termination was not a breach of contract," thereby inferring that a contract did not exist. Accordingly, the interest which Jones seeks to assert cannot be derived from a contract.

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[10]Id.

[11]"Except as stated in Section 698, one who, without a privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another is liable to the other for the harm caused thereby."

We now look to the Federal Constitution and laws for the source of the interest secured.

The Supreme Court has consistently held, "the interest of a government employee in retaining his job, can be summarily denied. It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer.... This principle was reaffirmed quite recently in Vitarelli v. Seaton, 359 U.S. 535."[12] The foregoing must be read in the light of the principle enunciated in Pickering v. Board of Education,[13] which quotes Keyishian v. Board of Regents.[14] The principle stated teaches that public employment may be denied altogether subject, however, to the restriction that unreasonable conditions may not be imposed upon the granting of public employment.[15] There is nothing in the complaint to warrant an inference or conclusion that the Colorado statute nor its application herein went "beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers."[16]

As a matter of fact, there are no allegations relating to conditions of employment of professors or assistant professors at southern Colorado State College. The complaint merely alleges the duties and authority of the administrators. Therefore, we can find no where in the complaint an allegation of any identified interest which is secured by the Federal Constitution of laws.

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[12]Cafeteria & Rest. Workers Local 473 v. McElroy, 367 U.S. 886, 896-897 (1961).

[13]391 U.S. 563, 568 (1968).

[14]385 U.S. 589, 605 (1967).

[15]Shelton v. Tucker, 364 U.S. 479 (1960).

[16]Id. at 490.

The complaint alleges a Colorado institution involved, governed by the laws of Colorado identified in the pleading. Appellant was a professor at this institution of learning. "It is clear that a professor is not an officer, but an employe' under contract to fill a chair of learning.[17]

The complaint alleges Jones was appointed for an academic year and then reappointed and served the entire second appointment. He was notified he would not be reappointed for a third academic year. The alleged interest deprived was in the appointment for a third year. It is admitted he did not have a tenure privilege either by Colorado law or contract. "Among the most fundamental rules of the law of master and servant is that which recognizes that, absent an applicable statutory or contractual provision to the contrary, an employer enjoys an absolute power of dismissing his employee, with or without cause."[18]

Southern Colorado State College is a state academic institution organized and existing under Colorado law which vests the government and management of its affairs in a board of trustees which has among other vestitures "power to appoint and remove all subordinate officers, professors, associate professors, teachers, assistants, employees or agents, in, or about, or concerning said college, to appoint or employ, discharge and suspend, contract and fail to renew contracts of employees and other subordinates...." (recited in complaint as set forth, supra).

We think this provision precludes Jones from having

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[17]State Board of Agriculture v. Meyers, 20 Colo. App. 139, 77 P. 372, 373 (1904). **See also** 75 A.L.R. 1352 (1955). "The courts are almost unanimous in holding that the position of a teacher is that of an employee, resting on the contract of employment, and not that of public officer."

[18]51 A.L.R. 2d 745, § 2 (1960).

the relief he seeks in this proceeding. His claimed interest must find its source in his expired appointment which constituted whatever contract existed. The provision above acknowledged became a part of any contract that may have existed between him and the college.

The provision specifically denies an expectancy to continued employment; therefore, absent an expectancy, there could be no interest.[19] "One has no constitutional right to a remedy' against the lawful conduct of another."[20]

As demonstrated above the right, privilege or immunity Jones alleges he was deprived of is non-existent.

We believe the appellees herein were exercising a discretion given them by the power vested under the Colorado statutes set forth in the complaint. The exercise of this discretion cannot, under the facts alleged in the complaint, become unlawful conduct which would justify its falling within the ambit of the Civil Rights Act.

"Because of the special needs of the university, both public and private, great discretion must be given it in decisions about the renewal of contracts during the probationary period. In deciding whether to rehire or grant tenure, the considerations involved go well beyond a judgment about general teaching competence."[21]

> " 'Will the interests of an institution of learning be promoted by dispensing with the services of a particular professor?' And yet if we assume that the statute

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[19]**See** Freeman v. Gould Special School Dist., 405 F.2d 1153, 1158 (8th Cir. 1969); Cobb v. Howard University, 106 F.2d 860 (D.C. Cir.) **cert. denied**, 308 U.S. 611 (1939).

[20]Senn v. Tile Layers Protective Union, 301 U.S. 468, 483 (1937).

[21]Developments in the Law — Academic Freedom, 81 Harv. L. Rev. 1045, 1101 (1968).

> of the state is of any virtue, it is just such a question that the plaintiff in error sought to have determined in the Circuit Court. It is a question which, in our opinion, the Legislature intended to commit to the sound judgment of the regents who are selected because of an especial fitness for the performance of such duties, and who, by their experience and their intimate familiarity with the institution, are qualified to exercise that discretion in a far sounder manner than any court or jury could be qualified by evidence adduced through witnesses. It is elementary that no cause of action can arise from the lawful exercise of a statutory power in the absence of an express provision conferring it. It is also a principle of law as securely founded that an exercise of a power by an administrative board or officer to whose judgment and discretion it is committed is not a proper subject of review by the courts when fraud or conditions equivalent thereto do not exist.'"[22]

> "It would be intolerable for the courts to interject themselves and to require an educational institution to hire or to maintain on its staff a professor or instructor whom it deemed undesirable and did not wish to employ. For the courts to impose such a requirement would be an interference with the operation of institutions of higher learning contrary to established principles of law and to the best traditions of education.'"[23]

The second claim re-alleges the various acts complained of in the first claim and describes the charge in the nature of a conspiracy to deprive Jones of claimed

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[22]Ward v. Board of Regents, 138 F. 372, 377 (8th Cir. 1905).

[23]Greene v. Howard University, 271 F. Supp. 609, 615 (D.D.C. 1967).

rights under the Civil Rights Act and the Constitution of the United States. The complaint alleges 42 U.S.C. §§ 1983, 1986 and 1988 in its jurisdictional allegations and 42 U.S.C. § 1985 (2) and (3) in its second claim. Combining them we examine what has been alleged in the complaint as a conspiracy on the part of appellees to deprive Jones of the rights claimed.

If one does not rely on the provisions of 42 U.S.C. § 1985 (3), relating to going in disguise, the existence of a conspiracy is an essential allegation in the complaint based upon the substantive law of the state.[24]

The complaint is based upon an act established by the Colorado statutes authorizing the exercise of discretion by the appellees. We concluded above there was not an unlawful or a wrongful exercise of the discretion claimed under the facts alleged.

Colorado has stated the rule, "[A]n action for conspiracy can not be successfully maintained unless the purpose to be effected is unlawful or a lawful purpose is accomplished by an unlawful means."[25]

This court has recognized the similar Utah rule regarding whether or not the action complained of is justified.[26]

The trial court concluded that under the Colorado Statutes the exercise of discretion was authorized and justified. We agree and affirm.

AFFIRMED.

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[24]Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962).

[25]Contract Main. Co. v. Local No. 105, Bldg. Serv. Emp. Internat'l Union, 160 Colo. 190, 415 P.2d 855, 856 (1966).

[26]Bank of Utah v. Comm'l Sec. Bank, 369 F.2d 19, 28 (10th Cir. 1966), **cert. denied**, 386 U.S. 1018 (1967).

SETH, Circuit Judge, with whom HOLLOWAY, Circuit Judge, joins, Dissenting:

This case comes to us on the dismissal of plaintiff's complaint for failure to state a claim. The majority has held that the complaint is legally insufficient because the plaintiff has asserted no "right" or "interest" to be protected by the Constitution. I must disagree because in my opinion the allegations are sufficient under the decisions of the Supreme Court for the case to be brought to trial.

The complaint describes plaintiff's two contracts of employment each for a year and asserts an expectancy of continued employment thereafter. He further alleges that he received a notice of termination. This letter advised him in part: "I regret to inform you that at the end of this academic year, your services with Southern Colorado State College will be terminated." There was no reference to any contract, but his services were terminated at the expiration date of his contract then in force. The plaintiff alleges that his services were so terminated solely because of his exercise of First Amendment rights.

The majority bases its opinion on the proposition that there was no "expectancy" of further employment, and thus the plaintiff had no "interest" to be protected by the First Amendment to entitle him to relief. The majority finds no "expectancy" by referring to the statutory powers of the trustees of the school to hire and fire (Colo. Rev. Stat. 1963, §§ 124-17 and 124-51), and states that:

> "The provision specifically denies an expectancy to continued employment; therefore, absent an expectancy, there could be no interest," (citing Cobb v. Howard University, 106 F. 2d 860 (D.C. Cir.)).

The majority then holds that there is no "interest," therefore no cause of action was alleged. The majority thus holds that under this Colorado Statute, and apparently in the absence of a contractual provision or of tenure specifically provided by statute, the board has unlimited power to discharge teachers. It holds that "beyond doubt" plaintiff could not prove otherwise. This is in error on two grounds; the first is that plaintiff could very well prove an "expectancy" of continued employment to exist outside any specific contractual or statutory provision, if this be necessary, and secondly, the board's power to discharge cannot be unlimited as the holding of the majority assumes.

To consider first the power to discharge, it appears that college professors may be "employees," as the majority says, as contrasted to "public officers"; but nevertheless they have many additional and unique perquisites, privileges, rights and concurrent burdens, obligations, and ethical standards which have been added, assumed, and accepted over a long period of time as part of their professorial positions. To categorize them as "employees" is not helpful nor is it really descriptive because it is incomplete. The majority then quotes from authorities to say that the fundamental rule of the master-servant relationship is that ". . . an employer enjoys an absolute power of dismissing his employee, with or without cause." As a practical matter, this again hardly fits the relationship between trustees or regents of a college or university and the professors or the lesser teachers at such an institution. See Shelton v. Tucker, 364 U.S. 479. The position of teachers relative to various supervisory boards has been the subject of many recent court decisions, and it would serve no purpose to develop the point here. These cases include Pickering v. Board of Education, 391 U.S. 563;

Keyishian v. Board of Regents, 385 U.S. 589; Weiman v. Updegraff, 344 U.S. 183; American Federation of State, County & Municipal Employees v. Woodward, 406 F. 2d 137 (8th Cir.); McLaughlin v. Tilendis, 398 F. 2d 287 (7th Cir.); Smith v. Board of Education of Morrilton School District No. 32, 365 F. 2d 770 (8th Cir.); Johnson v. Branch, 364 F. 2d 177 (4th Cir.]. Under this prevailing case law, I cannot agree that the Board here concerned had an unlimited discretion to discharge plaintiff. To include within the Board's discretion by statute, practice, or employment status the right to discharge for the exercise of First Amendment rights is certainly to attach unreasonable conditions to plaintiff's employment.

The Board certainly has broad discretion over the teaching staff and administrators, and is charged with the duty of operating the school in an orderly, effective, and professional manner. They can discipline and discharge those whose actions and words unduly interfere with teaching programs or with the teaching by others on the staff or otherwise seriously disrupt the operation of the school. (See the "... performance of daily duties in the classroom," in Pickering v. Board of Education, supra). But no matter how broad their discretion may be by statute or by custom it cannot be used to deprive teachers of their constitutional rights. This is what plaintiff has alleged, and this is sufficient. Whether he can prove it is indeed another matter, and a matter which has not yet been reached in this case.

The balancing referred to in Pickering v. Board of Education is done when the facts are in and not before. The Court there said:

"The problem in any case is to arrive at a balance

> between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public service it performs through its employees."

We cannot anticipate such a balancing of facts on this motion.

The exercise of constitutional rights cannot create for a teacher or be used as some sort of a protection or insulation against discharge for proper and adequate reasons, nor can it be under Pickering without limit any more than can the exercise of discretion by the Board. As to the position of the majority that plaintiff could not prove as a fact and beyond doubt an "expectancy" of continued employment, it must be observed that consideration is given in the opinion only to possible contractual and statutory provisions. The expectancy, if one is required, could very well arise from other sources or be based on school rules, practice, or custom as observed above. The plaintiff has alleged as a fact that there was such an expectancy. This is probably a mixed fact and law assertion, but we must assume on this appeal that the fact elements are capable of proof unless there is some legal bar. The majority says that the statutory powers of the trustees are such a bar, and also says that nothing arises by contract or statute.

The power bar has been considered above, but it is intertwined with the tenure or expectancy matter, and is mentioned again. But what is this "interest" or "expectancy" requirement? It would appear that a tenure requirement as a basis for asserting a cause of action has been long abandoned. McLaughlin v. Tilendis, 398 F.2d

287 (7th Cir.); Johnson v. Branch, 364 F. 2d 177 (4th Cir.). Teachers of whatever status do not give up First Amendment rights by reason of their employment. Pickering expressly so holds. Non-tenure teachers cannot be held to have more limited constitutional rights than do others. They are on a temporary basis not for reasons related to the problems before us, but instead on the quality of their teaching. Tenure is not the status which gives rise to the right to be protected. Tenure as a requirement for standing or to assert a cause of action has disappeared. The "expectancy" requirement of the majority does not seem greatly different from tenure. Some "interest" in continued employment or "expectancy" is an essential ingredient of both. This "expectancy" is perhaps a tenuous sort of tenure, but it is nevertheless such a requirement, and in my opinion can no longer be made.

I would thus hold that the complaint is sufficient as measured by the standards in the recent decisions of the Supreme Court, and the case should come on for trial.

MAY TERM, MAY 19th, 1969.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable John J. Hickey and Honorable William J. Holloway, Jr., Circuit Judges.

George Jones, Jr., Appellant,

9248 vs.

Jesse Victor Hopper, President of Southern Colorado State College, and C. Gale Sellens, William H. Southard, Robert W. Bartley, L. Richard Bratton, Phillip M. Lorton, Stuart W. McLaughlin, and Mrs. William B. Naugle, Members of the Board of Trustees of Southern Colorado State College, Appellees.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court be and is hereby affirmed.

Honorable Oliver Seth and Honorable William J. Holloway, Jr., Circuit Judges, dissented.

WILLIAM L. WITTAKER, Clerk,
By GLADYS E. HOBBS, Deputy Clerk.

[Seal]

Appeal from the United States District Court
for the District of Colorado.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9248

George Jones, Jr., Appellant,

vs.

Jesse Victor Hopper, President of Southern Colorado State College, and C. Gale Sellens, William H. Southard, Robert W. Bartley, L. Richard Bratton, Phillip M. Lorton, Stuart W. McLaughlin, and Mrs. William B. Naugle, Members of the Board of Trustees of Southern Colorado State College, *Appellees.*

No. below: 66-C290 Civil

Judge: Chilson

Notice of appeal: December 20, 1966

Action commenced: June 1, 1966

10/22/68	Motion for determination of appeal—Orig. and 3 cc.—Cert. of Service
1/24/69	Supplemental memorandum of Appellees—Orig. and 25 xerox copies Cert. of Service.
1/27/69	Appellant's Supplemental Memorandum—Orig. and 7 cc.—Cert. of Service
12/18/68	Cause set for rehearing en banc January 1969 session

1/20/69	Argued and submitted on rehearing, en banc Appellee to file supplemental memorandum in 5 days
5/19/69	Opinion: Per Curiam, En Banc—Judgment: Affirmed—Dissent: Seth and Holloway
6/24/69	Mandate
7/ 2/69	Original record on appeal returned to Clerk (1 volume) Receipt original record

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 475

GEORGE JONES, JR., *Petitioner,*

v.

JESSE VICTOR HOPPER, *et al., Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE, IN SUPPORT OF PETITION

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE, IN SUPPORT OF PETITION

The American Association of University Professors appears *amicus,* with consent of all parties, in support of the petition.

INTEREST OF AMICUS

Established in 1915, the American Association of University Professors ("AAUP") is the national professional organization of teachers and research scholars in all disciplines at accredited colleges and universities in the United States. Wth approximately

90,000 members affiliated through nearly 1,000 chapters, the Association represents about 30% of full time faculty in accredited institutions of higher education. The nature and history of the Association's long concern with laws or litigation which jeopardize academic freedom have been set forth in detail in its brief *amicus* in this Court in *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967).

The interest of the Association in this litigation proceeds directly from the Association's concern for the professional security of members of the teaching profession and the protection of academic freedom. A significant proportion of all college teachers, including of course many members of the AAUP, are employed by public universities under annual or term contracts which are subject to periodic renewal. Protection against discriminatory nonrenewal of such contracts on grounds forbidden by the First Amendment is necessarily of vital concern to the Association for precisely the same reason that it has been of equal concern to this Court. As the Court observed in *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250 (1957):

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

And, again, in *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603 (1967):

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers

> concerned. That is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

In recognition of the essentiality of this commitment, the 1940 *Statement of Principles on Academic Freedom and Tenure*, developed jointly by the Association of American Colleges and the AAUP, and endorsed by over sixty leading educational organizations and learned societies, specifically emphasizes that: "During the probationary [i.e., the term contract] period a teacher should have the academic freedom that all other members of the faculty have." 54 *AAUP Bull.* 384, 385 (1968).

The instant case is believed to raise a question of discriminatory nonrenewal exactly within our shared concern for academic freedom and the First Amendment.

QUESTION PRESENTED

Whether a claim alleging discriminatory nonrenewal of the contract of a state university faculty member in violation of the First and Fourteenth Amendments fails to state a cause of action under 42 U.S.C. § 1983 (the Civil Rights Act of 1871), for lack of a sufficient "property" interest or other substantial "expectancy."

STATEMENT OF THE CASE

On June 1, 1966, Associate Professor George Jones, Jr. filed a complaint against Respondents under 28 U.S.C. §§ 1331 and 1343(3), and 42 U.S.C. § 1983, seeking damages resulting from Respondents' alleged discriminatory nonrenewal of his contract. The complaint

alleged that Professor Jones' public university employment had been terminated solely because of certain oral and written statements all of which were set forth in the complaint in specific factual detail and all of which were alleged to be fully protected against such action under the First and Fourteenth Amendments.

Respondents filed a Motion to Dismiss which did not challenge or deny Plaintiff's allegations that the utterances set forth in the complaint were protected by the First and Fourteenth Amendments and that Respondents' disapproval of these utterances was the sole reason for the termination of his public employment. Rather, the Motion to Dismiss met these issues by asserting:

> Plaintiff has no federally protected constitutional rights to the renewal of his contract of employment. As a corollary thereto, Defendants have the right to refuse to renew an employment contract *for any reason,* where there were no rights of tenure as in the instant case. [Emphasis added.]

On November 28, 1966, the United States District Court for the District of Colorado granted the motion to dismiss, concluding that "It was a matter wholly within the discretion of the Defendants whether Plaintiff's contract would be renewed or allowed to terminate."

On May 19, 1969, the United States Court of Appeals for the Tenth Circuit, *en banc,* affirmed with two judges dissenting. *Jones* v. *Hopper,* 410 F.2d 1323 (1969). It appears convincingly that the decision to affirm was based solely on the (mistaken) proposition that a public employee aggrieved by the *nonrenewal* of his con-

tract has no sufficient "property interest" or "expectancy" in "future" employment as to be protected from discriminatory treatment which would otherwise be in violation of the First and Fourteenth Amendments. The court evidently believed that a crucial difference exists between one who is discharged within the term of a contract for reasons disallowed by the First Amendment, and one whose contract is simply not renewed. Thus, it sought to distinguish the case of *Bomar* v. *Keyes,* 162 F.2d 136 (2d Cir.) (Opinion by Learned Hand), *cert. denied,* 332 U.S. 825 (1947), *rehearing denied,* 332 U.S. 845 (1948), in which a similar claim by a probationary employee had been upheld, insisting that Plaintiff in *Bomar* had an "interest stemming from-[a] contract," while Jones, whose contract had come to an end, complained only of discriminatory nonrenewal. 410 F.2d at p. 1327. The majority concluded (*id.* at 1328):

> Therefore, we can find nowhere in the complaint an allegation of any identified interest which is secured by the Federal Constitution or laws.

At another point, the Opinion appears to go even further, quoting approvingly from a state court decision that (*id.* at 1328):

> [A]bsent an applicable statutory or contractual provision to the contrary, an employer enjoys an absolute power of dismissing his employee, with or without cause.

The dissenting Opinion (by Judges Seth and Holloway) similarly characterizes the majority's holding as suggested above (*id.* at 1330):

> The majority bases its opinion on the proposition that there was no "expectancy" of further

employment, and thus the plaintiff had no "interest" to be protected by the First Amendment to entitle him to relief. The majority finds no "expectancy" by referring to the statutory powers of the trustees of the school to hire and fire . . . and states that:

> "The provision specifically denies an expectancy to continued employment; therefore, *absent such an expectancy, there could be no interest.*" [Emphasis added.]

The dissent then proceeds to express the basis of its disagreement with the majority, noting (*id.* at 1331):

> The position of teachers relative to various supervisory boards has been the subject of many recent court decisions, and it would serve no purpose to develop the point here. [Citations to Pickering v. Board of Education, 391 U.S. 563; Keyishian v. Board of Regents, 385 U.S. 589; Wieman v. Updegraff, 344 U.S. 183, and other decisions in which this Court has protected constitutional rights of public employees.]
>
> . . . .
>
> The Board certainly has broad discretion over the teaching staff and administrators, and is charged with the duty of operating the school in an orderly, effective, and professional manner.
>
> . . . .
>
> But no matter how broad their discretion may be by statute or by custom it cannot be used to deprive teachers of their constitutional rights. This is what plaintiff has alleged, and this is sufficient. Whether he can prove it is indeed another matter, and *a matter which has not yet been reached in this case.* [Emphasis added.]

To secure review of the holding by the majority, Petitioner seeks a Writ of Certiorari.*

ARGUMENT OF REASONS FOR GRANTING THIS WRIT

We believe that the decision below is clearly incorrect, that it conflicts with many decisions of this Court, and that it utterly misapprehends the scope of the First and Fourteenth Amendments and of 42 U.S.C. § 1983. *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968): "To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court." *Sherbert* v. *Verner,* 374 U.S. 398, 404 (1963): "It is too late in the day to doubt that the liberties of . . . expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Wieman* v. *Updegraff,* 344 U.S. 183,

* We have been at pains to review the exact nature of the only issue clearly decided in the court below in deference to the settled practice of this Court not to consider issues prematurely, in advance of their resolution by a lower court. Thus, we believe that the Petition for a Writ of Certiorari should appropriately be granted in respect of the question as we have stated it. An examination of the full opinion by the Court of Appeals may suggest, however, that the court in some sense intimates that it also decided the separate question of whether Plaintiff's utterances which formed the basis for his termination were, under the circumstances, within the protection of the First Amendment. (See especially, 410 F. 2d at 1328.) We do not believe that the Court of Appeals either intended to or did in fact decide that question, but if this Court were to conclude otherwise then we would urge that it extend the grant of certiorari to consider that issue as well.

192 (1952): "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Slochower* v. *Board of Higher Education*, 350 U.S. 551, 555 (1956): "To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities."

The more compelling reason to grant the petition (and summarily to reverse if, as we believe, further briefs and arguments would be unnecessary in this case), however, is to avoid future misunderstanding by other courts and to avoid the chilling effect of insecurity which must be endured by literally thousands of other persons—an effect which must necessarily ensue—if the distinction maintained by the court below is allowed to stand. The court below recognized that Petitioner's complaint would have stated a claim entitling him to relief had it alleged that he had been discharged *during* the term of his employment solely for reasons violative of the First and Fourteenth Amendment. Unable to perceive any "interest" or "expectancy" injured by one who is discriminatorily treated in the *nonrenewal* of his public employment on identical grounds, however, the court purported to find a distinction which implies that governmental entities may refuse to hire, to rehire, or to give equal consideration for improvement in the current status of any person subject to their review solely from disapproval of the manner in which that person may have exercised his freedom of speech.

The source of the error below is understandable, namely, that the court discerned the issue to be whether the Petitioner had any "right" to future employment by the state. But the issue is, of course, not whether he has a "right" to future employment without regard to his qualifications, but whether he has a right to freedom of speech unabridged by discriminatory state action in the exercise of control over critical opportunities in the public sector. If, as Petitioner alleged (and as both courts below admitted to be true in passing upon the motion to dismiss), the *sole* reason for the nonrenewal of his public employment was from disapproval of his constitutionally protected utterances, his exclusion was *a fortiori* pursuant to standards "patently arbitrary or discriminatory" and just as forbidden to the state as though the decision to terminate him (or not to hire him) had been made solely because of his race, his political affiliation, or any other constitutionally invidious criterion. *Wieman* v. *Updegraff,* 344 U.S. 183 (1952). (It is significant, in comparison, that Keyishian, one of the successful plaintiffs in *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967), was himself a nonrenewal, rather than a dismissal, case, and that the successful plaintiff in *Whitehill* v. *Elkins,* 389 U.S. 54 (1967), which similarly involved issues of academic freedom, was actually a job applicant; compare also *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947), where this Court acknowledged that job applicants are equally to be protected as job holders, from exclusion pursuant to constitutionally invidious criteria.)

A denial of the Petition in this case would, accordingly, leave at large an erroneous but seemingly authoritative court of appeals decision of chilling consti-

tutional effect. The avoidance of that stultifying effect and the avoidance of future controversies of a similar nature are, we believe, substantial reasons for granting the Petition. Since the case does not, in its current posture, fairly raise any other issue (such as whether Petitioner's utterances solely accounting for his termination were within the protection of the First Amendment as alleged by him) we believe that summary reversal and remand to the district court may be appropriate.

Respectfully submitted,

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September, 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 475

GEORGE JONES, JR., *Petitioner*,

v.

JESSE VICTOR HOPPER, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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MOTION OF THE NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes the National Education Association (NEA) and respectfully moves this Court, pursuant to Rule 42, paragraph 3, of the Rules of this Court,

for leave to file the accompanying brief as *amicus curiae* in this case.

The consent of the attorney for the petitioner herein to the filing of this brief has been obtained and a letter by petitioner's attorney to this effect will be filed with the Clerk of the Court.

The consent of the attorneys for respondents was requested. Although respondents' attorneys did not wish to give their "consent" as such, they indicated that they would not object to NEA participating as *amicus*. A letter to this effect by respondents' attorneys will be filed with the Clerk of this Court.

The interest of the NEA and its reasons for asking leave to file a brief *amicus curiae* are set forth in the accompanying brief.

Respectfully submitted,

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---

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

The National Education Association (NEA), upon motion, appears as *amicus curiae* in support of the petition.

QUESTION PRESENTED AND INTEREST OF THE AMICUS CURIAE

1. *The Issue.* The present case raises the issue whether a complaint by a nontenured teacher or professor in a public educational institution, alleging that the teacher's contract was not renewed as a result of

his exercise of First Amendment rights, states a claim under Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, upon which relief can be granted.

This Court's disposition of this issue will have far-reaching consequences to countless teachers and professors throughout the country who have been or are being placed in the same situation as petitioner. The Appendix to this brief sets forth a partial listing and summary of recently decided and pending cases throughout the country involving this same issue.

2. *NEA's Interest.* The NEA has a special interest in the issue presented. The NEA was founded in 1857 and chartered as a non-profit corporation by act of Congress in 1906. Its membership includes more than one million professional educators, many of whom are nontenured teachers. Its charter purpose is to improve the character and advance the interest of the teaching profession and the cause of education in the United States. The NEA has established a fund for the protection of teacher rights, known as the "Du Shane Fund," through which NEA has supported cases across the nation which raise issues similar to that raised in the present case. NEA has accordingly gained special background, experience and competence which it desires to bring to bear on the issue raised in the pending case. NEA further believes that its approach to the issue presented differs from that of petitioner and the other *amicus curiae* (American Association of University Professors).

For the foregoing reasons, NEA deems it appropriate to request leave to appear as *amicus curiae* in support of the petition for writ of certiorari.

STATEMENT OF THE CASE

This suit arises under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Petitioner, a nontenured associate professor at Southern Colorado State College, alleged in his complaint that, in February 1966, he had received "notice that his services would be terminated at the end of the academic year by a letter sent from the President and authorized by the Board." *Jones* v. *Hopper*, 410 F.2d 1323, 1326 (10th Cir. 1969).[1] Petitioner further alleged that he "was not reappointed . . . because he had exercised his constitutionally protected rights," (*id.*) and more specifically that respondents had "denied him a right of expectancy to continued employment because he exercised freely his constitutional rights of speech, publication and religion" (*id.* at 1327).

On motion by respondents, the District Court dismissed the complaint on the ground that it failed to state a claim upon which relief could be granted. The Court of Appeals for the Tenth Circuit affirmed, *en banc* (two judges dissenting), on the ground that the complaint alleged no "identified interest" protected by the Constitution (*id.* at 1328) since the contract had expired by its own terms and the Professor had no tenure. Judges Seth and Holloway, dissenting, characterized the majority's position in the following manner:

> "The majority bases its opinion on the proposition that there was no 'expectancy' of further em-

[1] Petitioner was informed in the notice that "the Chairman of the Division and the Dean of the College and I agreed upon this decision. The Chairman of the Executive Committee of the College from the Trustees of State Colleges in Colorado was likewise informed at that time." *Id.* at 1326 n. 3.

> ployment, and thus the plaintiff had no 'interest' to be protected by the First Amendment to entitle him to relief . . . . The majority thus holds that under this Colorado statute, and apparently in the absence of a contractual provision or of tenure specifically provided by statute, the board has unlimited power to discharge teachers" (*id.* at 1330).

Petitioner now seeks review from this Court of the decision below.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Abruptly Departs From the Now Settled Rule That the Continued Employment of Teachers at Public Educational Institutions May Not Be Lawfully Conditioned Upon Their Relinquishing Constitutional Rights.

NEA believes that the decision below constitutes an abrupt departure from the settled law in this field and should therefore be summarily reversed concurrently with this Court's grant of the Writ of Certiorari.

Numerous decisions of this Court and of the federal courts of appeals have by now settled beyond dispute that a complaint alleging that a teacher has been denied reemployment at a public educational institution because of his exercise of First Amendment rights states an actionable claim under Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983.

Any dismissal from public employment or failure to renew the contract of a public employee must meet the test of what has been termed "the doctrine of unconstitutional conditions."[2] The doctrine prohibits the

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[2] *See, e.g.*, Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1445 (1968); Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595, 1596 (1960).

conditioning of "the enjoyment of a government-connected interest . . . upon a rule requiring that one abstain from the exercise of some right protected by an express clause in the Constitution."[3] It was explained by Mr. Justice Sutherland as early as 1926 in *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 593-94:

> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. . . . If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

This principle squarely underlies this Court's line of decisions in cases involving the termination of employment not only of teachers, but of other public employees as well. In *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968), one of the most recent of these decisions, this Court stated:

> "To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on

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[3] Van Alstyne, *supra*, 81 Harv. L. Rev. at 1446.

a premise that has been unequivocally rejected in numerous prior decisions of this Court."[4]

The decisions of other federal courts of appeals have also uniformly applied this principle. *E.g., Bomar* v. *Keyes,* 162 F.2d 136 (2d Cir.), *cert. denied,* 332 U.S. 825 (1947); *Johnson* v. *Branch,* 364 F.2d 177 (4th Cir. 1966), *cert. denied,* 385 U.S. 1003 (1967); *Pred* v. *Board of Pub. Instr.,* 415 F.2d 851 (5th Cir. 1969); *McLaughlin* v. *Tilendis,* 398 F.2d 287 (7th Cir. 1968). The Court of Appeals for the Tenth Circuit is alone in failing to apply the rule of law this Court has so clearly set forth. Such a plain aberration in this important area of constitutional law requires rectification.

II.

This Court Should Review and Reject the Reliance of the Court Below Upon a Putative Distinction Between Mid-Year Dismissal and Year-End Contract Nonrenewal as a Basis for Dismissing Without Hearing a Claimed Violation of Constitutional Rights.

The court below failed to recognize that the interest protected by the Constitution was petitioner's First Amendment rights. Instead, the Tenth Circuit sought

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[4] Among the cases the Court cited were Keyishian v. Board of Regents, 385 U.S. 589 (1967), and Wieman v. Updegraff, 344 U.S. 183 (1952). In *Keyishian,* the Court had emphasized the doctrine of unconstitutional conditions: "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." 385 U.S. at 605-06, quoting from the Second Circuit's opinion in *Keyishian* (345 F.2d 236, 239). In *Wieman* (344 U.S. at 191-92), the Court had illustrated the doctrine by quoting from United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947): "Congress could not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work."

to create some conceptual distinction between dismissal of a teacher whose contract was yet to expire and the refusal to renew an expired contract. Thus, in the court's view, dismissal of a nontenured teacher during the school term gives rise to a breach of contract of which the teacher may complain, whereas nonrenewal of a contract gives rise to no right because the contract has expired by its own terms. It was on this basis alone that the court below sought to establish a tenuous distinction between the facts in the present case and those in *Bomar* v. *Keyes, supra.*

The lower court's error was in treating the claim asserted by petitioner as one of contract at all. Petitioner alleged in his complaint not that a contract had been breached—whether by premature dismissal or failure to renew—but that his First Amendment constitutional rights to free speech, publication and religion had been violated by reason of respondents' refusal to renew the contract because petitioner had exercised those First Amendment rights. In viewing the issue as one of contract rights rather than constitutional rights, the Tenth Circuit has placed itself in direct contradiction to the other Circuits.

In *Bomar* v. *Keyes, supra,* 162 F.2d at 139, Judge L. Hand clearly recognized that the issue raised was not one of contract, but rather whether a probationary teacher's constitutional right to serve on a jury had been violated. The Fifth and Fourth Circuits have also found contractual and tenure status irrelevant. In *Pred* v. *Board of Pub. Instr.,* 415 F.2d 851, 856 (5th Cir. 1969), involving a nontenured teacher whose contract was not renewed, the court declared:

> "The right sought to be vindicated is not a contractual one, nor could it be since no *right* to re-

> employment existed. What is at stake is the vindication of constitutional rights—the right not to be punished by the State or to suffer retaliation at its hand because a public employee persists in the exercise of First Amendments rights."

Similar rights were asserted in *Johnson* v. *Branch*, 364 F.2d 177, 179 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967), also involving contract nonrenewal of a nontenured teacher:

> "There is no vested right to public employment. No one questions the fact that the plaintiff had neither a contract nor a constitutional right to have her contract renewed, but these questions are not involved in this case. It is the plaintiff's contention that her contract was not renewed for reasons which were either capricious and arbitrary or in order to retaliate against her for exercising her constitutional right to protest . . . ."

Were the spurious distinction created by the court below between mid-year dismissal and year-end contract nonrenewal substained, a new loophole would be opened by which State agencies might infringe upon, and inhibit the exercise of, First Amendment freedoms of teachers.[5] It would be easy enough for a public school or college administration to defer mid-year dismissal of a teacher whose First Amendment activities are distasteful or troublesome and merely await the end of the academic year, at which time the teacher's contract would not be renewed. "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 594 (1926).

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[5]Nonrenewal of contract, just like "dismissal from public employment is . . . a potent means of inhibiting speech." Pickering v. Board of Educ., 391 U.S. 563, 574 (1968).

CONCLUSION

For the foregoing reasons,[6] the Court should grant the writ of certiorari. Since, however, the decision below is an obvious departure from principles established by this Court and followed by other courts of appeals, the Court should summarily reverse the decision below and remand for trial.

Respectfully submitted,

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February 1970.

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[6] Although not raised by petitioner, another issue inheres in the present case, which in itself not only requires the grant of the writ and reversal, but summary judgment for petitioner as well. The fact is that before respondents determined not to renew petitioner's contract they did not afford him even the semblance of a hearing. Petitioner had a constitutional right to a proper hearing in order to determine whether the grounds for renewal were in fact violative of the First Amendment or otherwise arbitrary and capricious. See *Birnbaum* v. *Trussel*, 371 F.2d 672, 679 (2d Cir. 1966): "A full hearing was the only way plaintiff's substantial interest could have been protected, and Section 1983 affords him a right of action for injuries suffered in consequence of the denial of such a hearing." *See also* Van Alstyne, *supra*, 81 Harv. L. Rev. at 1453.

APPENDIX

Partial listing of recently decided and pending cases involving claims under 42 U.S.C. § 1983 by nontenured teachers that their contracts were not renewed because of their exercise of First Amendment rights.

Montgomery v. *White,* C.A. No. 4933, E.D. Tex.

The complaint, filed by a black teacher in the Tatum Independent School District in Texas, alleged that the plaintiff's contract and the contracts of eight other teachers were not renewed because of their involvement in outside political activities, namely their voter registration activities and their attempt to secure Negro representation on the board of trustees of the school system. On October 24, 1969, the Federal district court directed a verdict for the plaintiff, holding that, by failing to renew the contracts of the plaintiff and others similarly situated, the defendants had deprived them of their First Amendment rights.

Haubner v. *Rushton,* C.A. No. 4835-A, E.D. Va.

Plaintiff, a nontenured professor at Northern Virginia Community College, alleged that he was not reappointed because of his activity in attempting to organize at the college an affiliate of the National Faculty Association—a unit of the NEA. On December 4, 1969, after a day and a half of trial, the defendants agreed to a settlement under which plaintiff was awarded $20,000.

National Faculty Association of Community and Junior Colleges v. *State Board for Community Colleges,* C.A. No. 222-69-R, E.D. Va.

The complaint alleges that the defendants refused to renew the contracts of the plaintiffs—who had taught at Northern Virginia Community College—solely because of their activities as members of a National Faculty Association affiliate, and that the refusal was designed to dis-

courage membership in the plaintiff association and to intimidate teachers from forming professional organizations in Virginia.

Sindermann v. *Perry,* C.A. No. 28,372, C.A. 5.

The complaint, filed by a nontenured social science and government teacher at Odessa Junior College, who was president of the Texas Junior College Teachers Association, alleged that plaintiff's contract to teach had not been renewed because of his absence without permission to attend hearings of a legislative committee of the Texas senate in response to summonses from the committee, because the plaintiff had taken public positions in opposition to the views of the college administration, and because of his association with the "Committee to Elevate Odessa Junior College" to a four-year college status. From an order granting summary judgment for the defendants, the plaintiff has appealed.

Dickerson v. *Board of School Commissioners of Mobile County,* C.A. No. 3003-63-T, S.D. Ala.

The complaint, filed by three nontenured white teachers, who had been employed in all-black schools of the Mobile, Alabama school system, alleges that their contracts were not renewed because of their involvement in peaceful protests against alleged violations by the school system of the civil rights of black students.

Calvin v. *Rupp,* No. N69C15, E.D. Mo.

The complaint, filed by a nontenured journalism teacher who taught in the Brookfield, Missouri school system, alleges that his contract was not renewed, in part because of his activities as a member of the Community Teachers Association, and in part because he criticized censorship of the school newspaper.

Pavlak v. *Duffy*, C.A. No. 13436, D. Conn.

The complaint alleges that the plaintiff was one of six nontenured faculty members at Northwestern Connecticut Community College whose contracts were not renewed because of their support for the prior president of the college, who had been asked to resign by the board of trustees.

Haynes v. *Berna*, C.A. No. 69-1299-C, D. Mass.

The plaintiff, a nontenured white schoolteacher on Nantucket Island, alleges that her contract was not renewed because of "personal standards and prejudices of the defendants, including their disapproval of the plaintiff's association with and intention to marry a person not of her race."

Stevenson v. *Allen*, Case No. 70-33-Civ. T., M.D. Fla.

The complaint, filed by a nontenured professor at the University of South Florida, alleges that his contract is not being renewed because of his outspoken criticism of U. S. participation in the Viet Nam War, his open opposition to the Federal government's plan to create and maintain a system of anti-ballistic missiles, and his personal association with a large segment of the student body in peaceful off-campus protestations and other peaceful activities.

Enbysk v. *Board of Education*, C.A. No. 69C1056, N.D. Ill.

The complaint, filed by two nontenured teachers employed at an Illinois junior college, alleges that their contracts were not renewed because of their exercise of their constitutionally protected rights to speak out on matters concerning the policies of the college and their activities in organizing a professional association of teachers.

Smith v. *Losee,* Civil No. C283-69, D. Utah.

The complaint, filed by an associate professor of history at a junior college in Utah, alleges that the defendants refused to grant the plaintiff tenure and to renew his contract solely because of the exercise of his constitutional rights to express his opinions as a member of the community and of the Dixie College Faculty Association, and in order to discourage efforts by plaintiff and others to participate in political processes and develop a strong and independent faculty association, in violation of plaintiff's First and Fourteenth Amendment rights.

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IN THE

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October Term, 1969

No. 475

GEORGE JONES, JR., **Petitioner,**

v.

JESSE VICTOR HOPPER, President of Southern Colorado State College, and C. GALE SELLENS, WILLIAM H. SOUTHARD, ROBERT W. BARTLEY, L. RICHARD BRATTON, PHILLIP M. LORTON, STUART M. McLAUGHLIN, and MRS. WILLIAM B. NAUGLE, Members of the Board of Trustees of Southern Colorado State College, **Respondents.**

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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No. 475

GEORGE JONES, JR., **Petitioner,**

v.

JESSE VICTOR HOPPER, President of Southern Colorado State College, and C. GALE SELLENS, WILLIAM H. SOUTHARD, ROBERT W. BARTLEY, L. RICHARD BRATTON, PHILLIP M. LORTON, STUART M. McLAUGHLIN, and MRS. WILLIAM B. NAUGLE, Members of the Board of Trustees of Southern Colorado State College, **Respondents.**

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

COUNTER STATEMENT OF CASE

The facts of this case are the allegations which are contained in petitioner's voluminous Complaint and exhibits attached to the Complaint and incorporated therein by reference. It is observed that petitioner has not provided the Court a full record of all the matter contained in petitioner's Complaint and exhibits.

Petitioner's Complaint and the exhibits incorporated therein by reference, in essence, set forth the following fact situation. Petitioner was hired by Southern Colorado State College, on a probationary basis, as a professor of

philosophy on March 26, 1964. His employment contract was to last for one academic year. His employment contract was thereafter renewed in the spring of 1965 for another academic year which would end in May of 1966.

In February of 1966, the College, through its president and board of trustees, elected not to renew petitioner's employment contract for the next succeeding academic year to begin in September of 1966 and so notified petitioner by letter.

Petitioner filed this lawsuit for $300,000 in money damages against the president and members of the board of trustees of Southern Colorado State College for their decision not to renew petitioner's employment contract with the College.

Petitioner's Complaint alleged the powers of the board of trustees as the following:

> "The Board of Trustees is vested by [§§ 124-17-1 and 124-5-1 Colo. Rev. Stats. (1963)] with the entire control and management of the affairs of the College, has general supervision of said college and the control and direction of the funds and appropriations made thereto, with power to appoint and remove all subordinate officers, professors, associate professors, teachers, assistants, employees or agents, in, about, or concerning said College, to appoint or employ, discharge and suspend, contract and fail to renew contracts of employees and other subordinates, and to fix the salaries of each and prescribe their several duties. They further have the power and authority to prescribe the various books and texts to be used in the College, the courses of study and instruction and to

make all needful rules, regulations and By Laws for the good government and management of the same. The actions of President Hopper, hereinafter described, were approved, authorized and ratified by said Board of Trustees, and each of them."

It was further alleged in the Complaint that the acts complained of by petitioner were exercised under color of the statutes, regulations, customs and usages vesting the power referred to.

The Complaint and its attached exhibits then continued with a rather detailed description of some of the petitioner's activities during his probationary association with Southern Colorado State College. He describes at least six different multiple faceted incidents in which he was involved such as:

(1) Petitioner's quite vocal objection to the hiring of another associate professor and resultant non-hiring of petitioner's choice for the position.

(2) Petitioner's multiple publications in the city newspaper of his criticism and ridicule of the College's "General Semantics" course.

(3) Petitioner's published ridicule of Dr. H. I. Hayakawa and his textbook used in the "General Semantics" course and petitioner's part in the controversy which ultimately brought about cancellation of a scheduled personal appearance by Dr. Hayakawa at the College.

(4) Petitioner's founding of an "unofficial," "independent" publication with petitioner establishing himself as "faculty editor" to publish articles criticizing the College, the Vietnam war, labor problems at the local steel

factory and an article by petitioner accusing the College administration of "bugging classrooms" at the College.

(5) Petitioner's advocating pacifism and draft avoidance.

(6) Petitioner's active and physical resistance against execution by sheriff's officers of court ordered hospitalization of a student.

Petitioner concluded that because of his conduct and activities detailed in his Complaint, "[Respondents] terminated his contract as associate professor at said College, thereby carrying out repraisal against plaintiff for the exercise of his Constitutional privileges and violating his right to due process of law, freedom of speech and belief and privileges and immunities of United States citizenship."

Petitioner affirmatively alleged in his Complaint that Respondents' election not to renew petitioner's employment contract was not a breach of contract, but a termination of an expectancy of continued employment which petitioner claims was protected from invasion by the Federal Civil Rights Act.

The case was dismissed with prejudice by the United States District Court for the District of Colorado. Disposition by the District Court was affirmed by the United States Court of Appeals for the Tenth Circuit. The petitioner has now petitioned this Court for certiorari.

ARGUMENT

The judgment of the United States Court of Appeals for the Tenth Circuit is manifestly correct; it does not

depart from the accepted and usual course of procedure and does not warrant the exercise of this Court's power of supervision. There is insufficient basis to warrant a further review by this Court in this case.

I. *PETITIONER, AS A PROBATIONARY EMPLOYEE, HAD NO CONSTITUTIONAL RIGHT TO RENEWAL OF AN EXPIRED EMPLOYMENT CONTRACT.*

Petitioner's Complaint in essence charges that Respondents, individually and acting in conspiracy, refused to renew Petitioner's contract to teach at the college for the next succeeding school year.

While probably not of significant materiality, Petitioner referred to such non-renewal as "termination" of Petitioner's employment, which term is not an entirely accurate usage in this context. "Termination" connotes active as distinguished from passive conduct. In this case, from Petitioner's Complaint together with its incorporated exhibits, it is clear that Respondents' complained of conduct was simply permitting the existing employment contract with the College to lapse or end by its own terms. The fact that a courtesy notice issued to petitioner before the end of the contract period did not create an active termination of Petitioner's employment.

From the Federal Civil Rights Statute*, it is obvious that in order to maintain an action, the party making the claim must allege facts showing that the parties claimed against deprived him of rights, privileges and immunities secured by the Constitution and laws of the United States. *Flemming v. Adams*, 377 F.2d 975 (10th. Cir.), *cert. den.*, 389 U.S. 898 (1967).

* 42 U.S.C. § 1983.

At issue here is whether an employers' election not to renew an employment contract at the end of its term for the alleged reason that the employee, under such contractual arrangement, engaged in certain activities which enjoy full or limited protection under the Constitution, imposes the liability for money damages under the Federal Civil Rights Act. Stated conversely, do the Constitutional rights of free speech, assembly, religion, equal protection and due process carry with them the right to renewed contracts of employment, rendering an employee's job immune without further regard to either conduct of the employee or the terms of the employment contract?

The opinion of the Court of Appeals appropriately surveys the law and establishes the manner of approach in a case such as this. The Constitution and laws of the United States do not generally create any right to continued employment. Petitioner's claimed interest must find its source in his expired appointment. Since his probationary employment arrangement was self-terminating, Petitioner had no expectancy beyond the agreed term. Petitioner was therefore deprived of nothing, regardless of the reasons motivating Respondents to let the contract expire.

It will be noted from the Complaint and Petitioner's arguments herein, that Petitioner was never prevented from exercising his Constitutional rights. Prior restraint is not alleged nor here involved. This case concerns only the allegation that Respondents in some way carried out a repraisal against Petitioner by their exercising discretion and passively permitting the employment contract to expire by its own terms.

Even assuming, as we must, for the purpose of con-

sidering Petitioner's Complaint, that Respondents did decide to let Petitioner's employment contract expire because of Petitioner's frequent insubordination, public ridicule and other less than professional conduct, if Respondents determined that Petitioner, as a probationary employee, was thus undesirable for continued employment, they had a discretionary right and indeed a duty not to renew the employment relationship. See in this regard, *Adler v. Board of Education*, 342 U.S. 485 (1952). If the law were otherwise, there would be no freedom of contract and public employees could practice the rankest form of insubordination, then safely hide behind the right of free speech and be guaranteed absolute and permanent tenure.

We cannot agree with petitioner and those sharing the same interest that dictum of *Bowmar v. Keyes*, 162 F.2d 136 (2d Cir. 1947), establishes the proposition that the courts will protect an expectancy of renewed employment, for the "expectancy" of *Bowmar* in that case was to continue to be employed during the term of the contract which was terminated mid-term and not be offered another contract for a subsequent term. In the *Bowmar* case, a probationary teacher without tenure was *dismissed* during the term of her contract because she was absent from her position while serving on a federal jury. The school board had denied her any right to so serve. Judge Hand held that a teacher under such circumstances has a right to serve on a federal jury and cannot be discharged for doing so, although he conceded that there were limits to the right and that a teacher could be discharged for exceeding those limits.

The case of *Jensen v. Olson*, 353 F.2d 825 (8th Cir. 1965) at 829, distinguishes *Bowmar* in a case such as this:

> The Bowmar case is clearly distinguishable from this case. At issue in Bowmar was the denial of an absolute right to serve on a federal jury. The exercise of this right would not normally disrupt agency functions or destroy the necessary chain of command between a supervisor and employees under his supervision. Here plaintiff asserts a right to make any criticism or advance any charges he deems warranted and remain absolutely secure in his position. He wants the Constitution to serve as a personal protection in this dispute between himself and his superiors. It was not intended to, nor does it serve that function."

The case of *Hopkins v. Wasson*, 227 F. Supp. 278 (E.D. Tenn, 1962) aff'd. 329 F.2d 67 (6th Cir. 1962) cert. den. 379 U.S. 854 (1965) is helpful. In that case a school teacher claimed that the school board had refused to rehire her following the end of the term of her teaching contract because of "slanderous reasons which they uttered against her." The Court noted that she was not on tenure, held that she did not have a right to have her contract renewed and refused to inquire into the reasons for her discharge, regarding the matter as one of contractual rather than constitutional rights.

In *Henry v. Coahoma County Board of Education*, 246 F. Supp. 517 (N.D. Miss. 1963) *aff'd.*, 353 F.2d 648 (5th Cir. 1965) *cert. den.* 384 U.S. 962 (1966) a Negro school teacher brought an action under the Civil Rights Act seeking to be re-employed by the school board claiming that she had not had her contract renewed because she was a Negro. Holding that the real issue was one of contractual rights rather than constitutional protections, the Court stated, (246 F. Supp. at 521):

> "It must be borne in mind that plaintiff had a one year contract for the school year 1961-1962, that this contract was fully performed by the parties thereto, that it ran its course and expired. That contract is not and could not be in this case. By its terms and under the statutes no rights survived its expiration to any of the contracting parties. Defendants could not have required plaintiff to accept another contract, nor can plaintiff now require that she be given a new contract. The fact that she had been employed as a teacher for one year (or for more than one year) gave her no rights to re-employment for the school year 1962-1963, or for any other year."

The Court in *Parker v. Board of Education, Prince George's County, Maryland*, 237 F. Supp. 222, *aff'd.* 348 F.2d 464, *cert. den.* 382 U.S. 1030, *rehearing den.*, 383 U.S. 939 (1966), also looked to and gave effect to contract rights in ordering dismissal of a civil rights case where it was alleged that a probationary teacher was dismissed because of his right of free speech in use of a particular book in class.

The "expectancy" urged by Petitioner as a so-called Constitutional right was self-terminating. No one can have any sort of legally recognized continued contractual expectancy beyond the terms of the agreement which he has voluntarily entered and which itself governs the scope of the rights and obligations between the parties.

Another consideration inheres in the opinion. Petitioner and those sharing his interest refer to speech as an absolute. It is well recognized that not all speech is protected or worthy of protection. A person can be punished for his libels and slanders. A person can be held account-

able for his misrepresentations. One must bear the consequences if he actively incites a riot. The federal government through the Hatch Act may properly bar its employees from certain types of political activity. No person carries with him into the United States Congress, any state legislature, into the Supreme Court, or any other court, a complete Constitutional right to go into those places contrary to their rules and speak his mind on anything he pleases. Rights of free speech and assembly do not mean that everyone with opinions or beliefs to express may address a group at any public place, at any time and in any manner. See in this regard *Adderly v. Florida*, 385 U.S. 39 (1964); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *Waugh v. Mississippi University*, 237 U.S. 589 (1915).

It has always been recognized that insubordination to one's superiors has been a recognized ground for dismissal. The case of *Jensen v. Olson*, 353 F.2d 825 (8th Cir. 1965), is closely parallel on its facts. In that case, a civil service employee of the city was fired. He brought action in the federal court under the Civil Rights statute alleging his employment was wrongfully terminated because of his exercise of his right of free speech and that the defendant city officials and Civil Service Commission had conspired to deprive the plaintiff of his right of free speech, due process and had thus imperiled the city's contractual obligation to plaintiff. The court dismissed the action on defendant's motion and the Court of Appeals affirmed the dismissal. The Court of Appeals observed that plaintiff had no constitutionally protected right to continued public employment and held that plaintiff did not state a claim under the statute. The Court stated at page 828:

"Here plaintiff asserts a right to make any criticism

> or charges he deems warranted under the protection of the First and Fourteenth Amendments. Within the bounds imposed by the laws of libel and slander no one would deny that plaintiff has this right. Plaintiff, however, has no right to public employment. He may speak as he pleases and level charges at all suspects. But if the exercise of this privilege disrupts his own work and reduces the efficiency of the department he is subject to discharge for cause. The plaintiff has an absolute obligation to satisfactorily perform the duties and work inherent in his position. One of these duties is to conform to departmental regulations in making his investigations and reports. He may speak as he wishes but also must be responsible for his statements. When his speech is disruptive of the proper functioning of the public's business the privilege of governmental employment may be withdrawn without it being said that he was denied his freedom of speech. To hold otherwise would enable governmental employees to practice the rankest form of insubordination and safely hide behind the right of free speech. Baily v. Richardson, supra, 182 F2d at pages 59-60 held that 'The first Amendment guarantees free speech and assembly, but it does not guarantee Government employ. * * * [T]here is no basic right to Government employ, any more than there is to employment by any other particular employer'."

In this context it is generally recognized that while speech usually may not be restrained, persons making utterances are responsible for what they say. The nature and character of the utterances are therefore of significance.

In viewing Petitioner's voluminous Complaint and its incorporated exhibits it becomes apparent that there were

a number of different types of utterances and activity involved. There was conduct as well as words. A goodly portion of Petitioner's published ridicule was directed at his employers out of prescribed channels of communication. There was obvious violation of school policy. There was obvious insubordination. Petitioner and those espousing the same interest appear to have been very careful in their effort to divert attention away from the nature and character of Petitioner's utterances and conduct.

The case of *Pickering v. Board of Education*, 391 U.S. 563 (1968), concerned a teacher on tenure, who was dismissed midterm because of his single utterance, as a private citizen, on a matter of "public concern" to wit, a community bond issue election. The Court considered the nature and quality of his speech, finding that it was made away from school as a private citizen and taxpayer concerning a public issue in which he was concerned as any other member of the community. This case is cited by Petitioner as authority for his position in the case, but it will be observed that the facts of that case are quite different from the instant case.

Petitioner suggests that dismissal of his case was perhaps premature. To the contrary; where one by voluminous and detailed pleadings sets forth facts which provide a complete defense, no further factual hearing is necessary. 41 Am. Jur. Pleading §88, p. 353. Indeed, the courts below found there was sufficient basis for dismissal with prejudice.

Petitioner has described his conduct in some detail and his judicial admissions reveal the nature and quality of his activities. Where a probationary instructor was concerned, any one violation of school policy or any one act

of insubordination would be sufficient justification for a desire by an employer not to continue what was obviously becoming an improvident and worsening employment relationship.

Petitioner speaks of "discrimination" and suggests that in this context it makes no difference if a person is being hired for the first time or rehired. Certainly, if a person seeking a probationary teaching job tells his prospective employers on his job application and during his placement interviews that he fully intends not to adhere to school policy; intends to shun usual channels of communication; intends to found an "unofficial" newspaper to enable him to ridicule the school and its administration; intends to publicly spread accusations that the classrooms at the school are "bugged"; intends to embarrass the school administration by creating enough strife and feeling that a nationally recognized educator will cancel his scheduled appearance and avoid school; certainly if a job applicant so notifies his prospective employers of such plans, they would be justified in looking elsewhere to fill the position. Here the quoted language from *Jensen v. Olson, supra,* is clearly applicable.

As was stated in the opinion by the United States Court of Appeals below, *Jones v. Hopper, et al,* 410 F.2d 1323 (10th Cir., 1969), at page 1329:

> "We believe the appellees herein were exercising a discretion given them by power vested under the Colorado statutes set forth in the Complaint. The exercise of this discretion cannot, under the facts alleged in the Complaint, become unlawful conduct which would justify its falling within the ambit of the Civil Rights Act.

" 'Because of the special needs of the university, both public and private, great discretion must be given to it and decisions about renewal of contracts during the probationary period. In deciding whether to rehire or grant tenure, the considerations involved go well beyond a judgment about general teaching competence. " 'Will the interest of an institution of learning be promoted by dispensing with the services of a particular professor? And yet if we assume that the statute of the state is of any virtue, it is just such a question that the plaintiff in error sought to have determined in the Circuit Court. It is a question which, in our opinion, the Legislature intended to commit to the sound judgment of the regents who are selected because of an especial fitness for the performance of such duties, and who, by their experience and their intimate familiarity with the institution, are qualified to exercise that discretion in a far sounder manner than any court or jury could be qualified by evidence adduced through witnesses. It is elementary that no cause of action can arise from the lawful exercise of a statutory power in the absence of an express provision conferring it. It is also a principle of law as securely founded that an exercise of a power by an administrative board or officer to whose judgment and discretion it is committed is not a proper subject of review by the courts when fraud or conditions equivalent thereto do not exist. [Citation.]

" 'It would be intolerable for the courts to interject themselves and to require an educational institution to hire or to maintain on its staff a professor or instructor whom it deemed undesirable and did not wish to employ. For the courts to impose such a requirement would be an interference with the operation of

institutions of higher learning contrary to established principles of law and to the best traditions of education'." [Citation.]

II. *THERE WAS NO CONSPIRACY.*

The second claim in Petitioner's Complaint which alleges conspiracy falls with the first. Respondents were authorized by statutes to exercise their discretion in selecting and maintaining its staff. One cannot be held liable for merely doing in a proper manner that which he has a lawful right to do. *Contract Maintenance Co. v. Local No. 105*, 160 Colo. 90, 415 P.2d 855 (1966). The same principle should apply to a situation as here where the conduct is passive.

Since the only conclusion can be that under Colorado statutes, the exercise of discretion by Respondents was authorized and justified, there is nothing further to consider.

CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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